No. 72-1371

IN THE

Supreme Court of the United States

October Term, 1973

DONALD C. ALEXANDER,
Commissioner of Internal Revenue,

Petitioner,

v.

"AMERICANS UNITED" INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR THE RESPONDENT

ALAN B. MORRISON
Room 515, 2000 P Street, N.W.
Washington, D.C. 20036

FRANKLIN C. SALISBURY
Room 545, 1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Respondent

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OPINION BELOW

The opinion of the Court of Appeals (A[1] 22-45) is now officially reported at 477 F.2d 1169.

STATEMENT OF THE CASE

Respondent was organized as a non-profit, educational corporation under the laws of the District of Columbia in 1948. On July 3, 1950, the Commissioner issued a ruling exempting respondent from income taxation under the predecessor of section 501(c)(3) of the Internal

[1] "A" references are to the separately bound record appendix.

Revenue Code of 1954. The effect of this ruling was also to establish respondent's eligibility to receive contributions which would be deductible by the donor under the predecessor of section 170(c)(2) of the 1954 Code. After it obtained its ruling letter, respondent's name was added to the Commissioner's official list of organizations to which contributions are tax deductible (hereinafter the "cumulative list"). Thereafter, respondent was able to begin its fund raising in earnest since the ability to assure donors that their contributions will be deductible is the *sine qua non* for obtaining financial support for organizations such as respondent.

Beginning in 1965, the Internal Revenue Service commenced an investigation into the activities of respondent with a view toward the possible revocation of the 1950 ruling. After unsuccessful attempts to work the matter out administratively, the Commissioner revoked the 1950 ruling on April 25, 1969 on the ground that respondent had violated sections 170(c)(2)(D) and 501(c)(3) by devoting a substantial part of its activities to attempting to influence legislation (A 7-10). Shortly thereafter respondent was issued a ruling exempting it from income taxation as a social welfare organization under section 501(c)(4) of the Code. However, this change in status meant that contributions to Americans United were no longer deductible by a donor under section 170(c)(2). As a result contributions to Americans United dropped off sharply so that for the first time in twenty years it was unable to raise sufficient funds to fully offset its expenses (A 15). Since respondent continued to be exempt from income taxation under section 501(c)(4),[2] the only change in its own tax status was that it

[2]Even if it were not exempt under section 501(c)(4), it is unlikely that Americans United would have had any taxable income since contributions are excluded from taxable income by section 102.

had to pay employment taxes pursuant to section 3301 because its prior exemption under section 3306(c)(8) was lost when its 501(c)(3) status was revoked.

Because the ruling caused a significant decline in its contributions, respondent filed suit in the United States District Court for the District of Columbia on July 30, 1970, to challenge the legality of the revocation on a variety of grounds.[3] It alleged that the substantiality test of sections 170(c)(2) and 501(c)(3) created an unconstitutional disparity between large and small organizations, with a larger, wealthier organization being able to spend far more on its legislative efforts than its smaller and poorer brethren without running afoul of the substantiality test. The complaint also alleged that the Commissioner had penalized respondent by revoking its ruling because of its attempts to influence legislation and that it was unconstitutional to penalize First Amendment activities in this fashion. It further alleged that the statutory standards of "substantiality" and "propaganda" were so lacking in specificity as to be devoid of meaning and hence unconstitutional (A 15), especially since crossing these vague boundaries would result in the severe penalty of losing the right to receive tax-deductible contributions.

Jurisdiction was claimed under 28 U.S.C. §1331, since the amount in controversy resulting from lost contributions exceeded $10,000, under 28 U.S.C. §1340 since the case was one "arising under [an] Act of Congress providing for internal revenue", and under 5 U.S.C. §§701-706, section 10 of the Administrative Procedure Act, as an action to review

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[3] Since it is the allegations of the amended complaint which were used by the District Court and Court of Appeals to determine whether a substantial constitutional question was presented, references throughout the brief will be to the amended complaint (A 11-17) rather than to the original complaint.

the final determination of the Service that respondent was no longer entitled to receive tax-deductible gifts. Because of the challenge to the constitutionality of various aspects of sections 170(c)(2) and 501(c)(3), respondent sought the convening of a three-judge court pursuant to 28 U.S.C. §2282.

The Government moved to dismiss the action, contending that there was no subject matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted, that it sought a declaratory judgment with respect to federal taxes and was thus barred by a proviso in the Declaratory Judgment Act, 28 U.S.C. §2201, and that the provisions of section 7421 of the Internal Revenue Code, the Anti-Injunction Act, prohibited the granting of the injunctive relief sought (A 18-19). Just six days after argument the District Court entered a brief order dismissing the action. It found no substantial constitutional question and held that the anti-injunction provisions of section 7421(a) and the exception to the Declaratory Judgment Act prohibited the relief sought by respondent (A 21).

Although the appeal was briefed in a timely fashion, it was not until early September 1972, or almost a year and a half after the dismissal in the District Court, that the case was argued. After argument had been scheduled, petitioner filed a supplemental memorandum in the Court of Appeals raising for the first time the possibility that Americans United itself had a means to test the legality of the ruling revocation. That memorandum was submitted in response to the contention of Americans United in its reply brief that the Commissioner's position had left it with no available remedy and thus raised the most serious constitutional questions. The Commissioner countered with his suggestion that a suit for refund of employment taxes (hereinafter "FUTA taxes"), which Americans United

began to pay after the revocation of its 501(c)(3) ruling, was available to challenge the legality of that revocation.[4]

On January 11, 1973, the Court of Appeals handed down its opinion, reversing the decision of the District Court and remanding the matter for the convening of a three-judge court. It rejected the Government's arguments that the Anti-Injunction Act and the exception to the Declaratory Judgment Act precluded respondent from obtaining judicial review in the manner sought. It held the Government's defense of sovereign immunity to be inapplicable and found the constitutional questions presented to be "substantial" and thus to require the convening of a three-judge court. On June 4, 1973, the Government's petition for a writ of certiorari was granted.

STATUTES INVOLVED

The relevant portions of the Internal Revenue Code, Declaratory Judgment Act, and the applicable jurisdictional statutes are set forth in the Appendix, pages 48-54, *infra*.

SUMMARY OF ARGUMENT

The issue in this Court is whether a charitable organization such as Americans United is prohibited from bringing a suit for injunctive relief in a district court in order to obtain meaningful review of a decision of the IRS to deny it the right to receive tax deductible gifts, where that denial raises substantial constitutional questions. The issue is not the right to make the challenge; the Government concedes that judicial review of some sort is entirely proper.

[4]The Commissioner also suggested that a refund suit for social security taxes would be available, but for the reasons set forth in Note 13 of the Opinion of the Court of Appeals (A 35-36), Americans United was unable to avail itself of that suggestion.

The dispute arises, then, over the proper procedures and whether Congress in the Anti-Injunction Act and the exception to the Declaratory Judgment Act has specifically precluded this kind of action.

The primary contention of the Commissioner is that the prohibition of section 7421(a) against injunctions "for the purpose of restraining the assessment or collection of any tax" and the exception to the Declaratory Judgment Act, which prohibits rulings "with respect to federal taxes", operate to bar Americans United from testing the legality of the ruling revocation in the manner sought in this action. It is petitioner's contention that the only method by which respondent can raise the issue in court is by means of a suit for the refund of FUTA taxes which are now payable since the exemption from those taxes applies only to 501(c)(3) and not 501(c)(4) organizations. The outcome of this controversy turns upon whether the prohibitions which concededly apply to most, but not all, tax cases apply in this instance where what is at issue on the merits is essentially a constitutional and not a tax question.[5]

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[5]Petitioner argues (Br. 37-42) that, even if the Anti-Injunction Act does not preclude the maintenance of this action, the exception to the Declaratory Judgment Act does. In our view the Declaratory Judgment Act neither strengthens nor weakens our case. We concede that, if an injunction is prohibited by section 7421, we cannot circumvent this bar by use of the Declaratory Judgment Act. As Judge Tamm pointed out in his opinion in the Court of Appeals, the exception to the Declaratory Judgment Act was added to prevent taxpayers from using that Act to circumvent section 7421, and the prohibitions were intended to be coextensive. (A 29-30). The legislative history cited by Judge Tamm establishes that this was the purpose of adding the proviso to the Declaratory Judgment Act, and none of the authorities cited by petitioner (Br. 38-41) holds to the contrary. Respondent can obtain full relief without the Declaratory Judgment Act, and accordingly we will make no further reference to it in this brief, and will deal solely with section 7421.

It is respondent's position that the Commissioner has sought to apply section 7421 to a case which is neither literally within its prohibitions, nor comes within its purpose. The Anti-Injunction Act was intended to protect the Government in the collection of revenue and to require taxpayers to contest tax determinations in the manner prescribed by law and not by injunctive actions. Since this case does not seek to restrain the assessment or collection of any taxes owed by Americans United, it falls outside the terms and purposes of section 7421, and hence that provision has no applicability here.

In addition, the Government has disregarded significant and highly relevant Supreme Court decisions, in particular *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938), which have permitted injunctive actions in situations analogous to this one to be maintained in spite of the prohibition of section 7421. Petitioner has, in our view, placed undue reliance upon this Court's decision in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), where the taxpayer sought to enjoin the assessment and collection of taxes that were directly payable by it, whereas no such relief is sought here. Although the language in *Enochs* is broad, its facts are readily distinguishable from those presented here, and it should not be applied in this situation.

Furthermore, the Commissioner fails to appreciate the inadequacy of the remedy which he suggests. Because of the intricacies of the tax law, it is questionable whether a suit for refund of FUTA taxes is realistically available in this case or in many others where an organization is denied the right to receive tax-deductible contributions. Such suits are beset with serious problems of delay and the real possibility that the issues which the organization seeks to have adjudicated will not be passed upon by the Court. Moreover, even if the refund suit were to result in a full adjudication in

plaintiff's favor of the legal issues which it raises, it can never "refund" contributions which respondent has lost in the interim; the relief is limited to the return of relatively insignificant FUTA taxes paid. The absence of meaningful alternate remedies distinguishes this case from *Enochs* and the other authorities relied upon by the Commissioner, and brings it squarely in line with the decisions of this Court which have permitted injunctions to issue in spite of the prohibition of section 7421.

The Commissioner's claim of sovereign immunity is also without merit. That defense has never been a bar in any of the other section 7421 cases because the rule laid down by this Court in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which permits an injunction against unconstitutional or illegal activities by a federal officer, is applicable in these situations. Moreover, petitioner's attempt to distinguish *Larson* focuses only on one of the several prayers for relief—the placing of plaintiff's name on the cumulative list of exempt organizations. Even if sovereign immunity applies to that kind of affirmative relief, it has no bearing on the right to obtain other orders that will enable respondent to receive tax-deductible contributions once again.

The final contention of the Government—that there is no "substantial" federal question requiring the convening of a three-judge court—is also in error. An issue is "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous. . . ." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). The Court of Appeals correctly held that at least one argument of Americans United—that the substantiality test of sections 170(c)(2)(D) and 501(c)(3) unconstitutionally discriminates against it as a small organization when compared with larger organizations—raised a non-frivolous question requiring the convening of a three-judge court. *Cammarano v. Commissioner*, 358 U.S. 498 (1959), so heavily relied upon by

petitioner, is not dispositive since the discrimination alleged here was not presented to this Court for a decision in that case.

In addition, although not stressed in the Court of Appeals, the complaint contains several other constitutional issues which are clearly substantial. *Cammarano, supra,* which dealt with the deductibility of lobbying expenses, did not pass upon the constitutionality of conditioning the right to receive tax deductible contributions upon a surrender of the First Amendment right to petition the Government. Imposing a severe penalty for exercising that right clearly goes beyond the denial of a deduction for the cost of exercising it, and thus raises serious constitutional question under *Speiser v. Randall,* 357 U.S. 513 (1958). Moreover, no decision of this Court has ruled on the allegations of plaintiff that the standards "substantiality" and "propaganda" in section 501(c)(3) are so vague as to be constitutionally invalid (A 15), particularly in light of the heavy penalty that overstepping these hazy boundaries can cause. While respondent may not ultimately prevail in its constitutional challenges, this Court has made it clear that no such certainty is required before convening a three-judge court.

ARGUMENT

I.

THE RIGHT OF RESPONDENT TO CHALLENGE THE RULING REVOCATION IN THE MANNER SOUGHT IS OF VITAL IMPORTANCE TO IT.

While this case arises under the Internal Revenue laws, it really has very little connection with the taxes of Americans United. The sole tax consequence to respondent itself from a victory in this case would be the elimination of

FUTA taxes, which never reached $1,200 for any of the four years following the revocation. See Pet. Br. p. 4, note 2. Those taxes are inconsequential when compared with the loss in contributions resulting from the revocation. In fact, the revocation letter only advised respondent that it was liable for income taxes,[6] and failed to mention that its exemption from FUTA taxes was also lost. (A 10). The connection between the ruling revocation and the imposition of FUTA taxes was first pointed out to respondent in August 1972, when the Government filed its supplementary memorandum in the Court of Appeals. The complaint makes no mention of such taxes and specifically states that it is not seeking the refund of any taxes (A 15). None of this is surprising when one considers that, while this suit was pending in the District Court, the then Commissioner of Internal Revenue, Randolph W. Thrower, stated that the only method of obtaining judicial review of a determination denying an organization its 501(c)(3) status was by a suit brought by a donor who "as a guinea pig" made a contribution for which a deduction was denied as a result of that determination. R. W. Thrower, *New Developments in Tax-Exempt Institutions*, 34 Journal of Taxation 168 (March 1971). If the Commissioner himself did not consider the availability of a FUTA remedy, it is no small wonder that taxpayers and their counsel did not consider it or regard it as an adequate remedy.

The real problem for respondent lies not in the imposition of the minimal FUTA tax imposed by section 3301, but in the loss of its eligibility to receive contributions which are deductible under section 170(c)(2).[7] For better or

[6]Later modified by the granting of 501(c)(4) status.

[7]When grants are sought from private foundations, it is not the deductibility question that creates the problem, but the liability that may be incurred by a private foundation for making a gift for purposes other than those described in section 170(c)(2). See section 4945(d)(5). In any event, the effect of the ruling revocation on the charity is the same—the denial of access to funds.

for worse, an assurance of deductibility under section 170(c)(2) is essential to the fund-raising activities of a very large number of charitable organizations in this country. Gifts of cash or appreciated property are made in most cases only if they are deductible, and an organization unable to provide an assurance of deductibility would generally find it impossible to raise enough money to sustain its operations. The purpose of this action is to obtain reinstatement of the essential ruling which enabled respondent to give would-be donors such assurances, and thus a FUTA tax refund suit would be only a back-door device to achieve the end which the Commissioner suggests is barred by section 7421.

The decision of the Court of Appeals (A 32), as well as that of the Fourth Circuit in *Bob Jones University v. Connally*, 472 F.2d 903, 906, *rehearing denied*, 476 F.2d 259 (1973), *petition for writ of certiorari pending*, No. 72-1470, acknowledges that the ability to attract tax-deductible contributions is a major factor in the financial success of an organization such as Americans United. Inclusion on the Service's cumulative list of qualified organizations is, in effect, a license to begin serious solicitation of contributions. In part because the requirements for qualification for a favorable ruling are not wholly self-explanatory, and in part because of the wide variety of organizations that apply for such rulings, the process by which the ruling is given, and the taxpayer's name added to the cumulative list, involves negotiation, explanation, and compromise with the employees of the Service. It is through this kind of process, which stretches over many months and sometimes years, that the organization's position is presented to the Service, and objections are voiced, and corrections can be made. It is only after the Service becomes satisfied that all of the requirements of the statute have been met that it will issue the ruling giving the advanced assurance of deductibility.

We do not understand the Commissioner to dispute the importance of the advance assurance of deductibility and the value of the inclusion of respondent's name on the cumulative list. Thus, what is at stake here is not simply an issue of tax procedure, but the right of a charitable organization to make a meaningful challenge to the loss of its "license" to receive tax-deductible contributions. We submit that the right to make this challenge should apply in cases such as this, where respondent contends that the underlying statutes which caused the revocation are themselves unconstitutional, or where a revocation decision is arbitrary, capricious, or without foundation in fact or law.

If the Commissioner is correct in his interpretation of section 7421, organizations may have to go out of business or at least seriously cut back on their activities because of the absence of any means to maintain the flow of tax-deductible gifts. Furthermore, without direct access to injunctive relief in a district court, some taxpayers will accede to the demands of the Service, even where those demands are improper, because they cannot be resisted in view of the enormous power wielded by the Service in denying or revoking tax rulings. Since some of the positions taken by the Service restrict the freedom of speech and action of charitable organizations beyond the limitations clearly imposed by the Code, the denial of a remedy here poses most serious First Amendment problems. On the other hand, the existence of a remedy, even one which is rarely invoked, can have a salutary effect on an administrative agency which has its actions insulated from meaningful judicial review. Finally, it cannot be overlooked that organizations such as Americans United are primarily engaged in protected First Amendment activities, *i.e.*, the right to associate freely and to speak out on matters of concern to them, quite apart from their right to petition the Government for redress of grievances. Thus, the absence of a right of direct access to

the courts by organizations which are trying to establish their right to continue to engage in First Amendment activities raises serious constitutional problems of prior restraint, see *Freedman v. Maryland*, 380 U.S. 51 (1965), which can be avoided by holding section 7421 to be inapplicable to this situation.

In the face of the strong need shown by charitable organizations to obtain the relief sought, it would be expected that the Commissioner, who concedes that section 7421 can be waived (Br. p. 29, note 18), would have weighty considerations to urge in his behalf before invoking it. Yet that is not the case. The contention that there would be a significant disruption in the collection of the revenue does not withstand scrutiny. First, no injunction against the collection or assessment of respondent's taxes was sought here, but even if it were sought and granted, the taxes involved are the trifling amounts due under FUTA. In many cases not even those would be payable because of the statutory exemptions for small organizations under section 3306(a), and because some charities would not be able to afford to pay salaries without the benefit of tax-deductible contributions.

Petitioner argues that the taxes which would not be paid as a result of an injunction would be those payable by donors and that the purpose of section 7421 would be circumvented in that manner. This argument is of dubious accuracy, however, since it is likely that after a ruling revocation many donors would simply re-direct their largesse to another organization which is on the Commissioner's cumulative list. Thus, while there may be some loss of revenue resulting from an injunction against a ruling revocation, no significant disruption in the collection of any taxes is likely. In fact, the contrary may be true since, if donors refrain from making contributions, money will not be available to pay the salaries of employees and to make other purchases, and hence taxes on those transactions

would not be payable to the Government. In short, while it is conceivable that some revenue loss may result from the granting of an injunction, it is almost certain that the loss would not be significant and that any harm to the Government from that loss is vastly outweighed by the harm to the aggrieved organization by reason of the loss of contributions resulting from a ruling revocation. Finally, it cannot be assumed that the mere filing of a complaint and an application for preliminary relief will automatically result in a victory for the organization and a loss for the Commissioner. Although the equities may be weighed heavily in favor of the charity, it still must satisfy the burden of showing a likelihood of success before an injunction can issue. See *Virginia Petroleum Jobbers Ass'n v Federal Power Comm.*, 259 F.2d 921 (D.C. Cir. 1958).[8]

The named plaintiff here is Americans United, but the outcome of this case potentially affects every organization in this country which depends upon tax-deductible contributions for its finances. We submit that the clearest congressional command should be required before denying such organizations a meaningful opportunity to challenge the IRS' administrative actions in revoking their licenses to receive tax-deductible contributions. Moreover, as demonstrated below, the purposes of section 7421 would not be served by applying it here, nor do the decisions of this Court command any such result.

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[8]Any suggestion that a ruling in respondent's favor would open the floodgates of litigation in the district courts (Br. 33) necessarily implies that the Commissioner is either enforcing a large number of statutes whose constitutionality is in sufficient doubt and whose effects are sufficiently harsh as to warrant the time and expense of challenging them, or that employees of the Service are regularly acting in an arbitrary or capricious manner. Neither of these propositions has yet been demonstrated.

II.

THE PURPOSE OF SECTION 7421 DOES NOT SUPPORT ITS APPLICATION IN THIS CASE.

The predecessor of section 7421(a), the Anti-Injunction Act, was enacted in 1867 as section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 475 and was codified as R.S. §3224 (2d Ed. 1878). This prohibition against any suit "for the purpose of restraining the assessment or collection of any tax" was expressly enacted so that "there might be no misunderstanding of the universality of this principal. . . ." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1876). In fact, prior to the enactment of R.S. §3224, equity courts would not enjoin the collection of a tax solely on the grounds of illegality, but required other equitable grounds for invoking injunctive relief. See *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932). It thus appears that the Anti-Injunction Act was little more than a codification of the prior principle of non-interference with the collection of taxes, except in extraordinary situations, a view which is fully supported by other decisions of this Court described in Point III.

The policy of non-interference with the collection of taxes embodied in the Anti-Injunction Act has been described by this Court as one "founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment. . . ." *State Railroad Tax Cases, supra* at 613-614. As this Court noted in *Snyder v. Marks*, 109 U.S. 189, 191-192 (1883), the Anti-Injunction Act was added to the tax refund provisions to indicate a clear expression on the part of Congress that the refund method was considered to be fully adequate to redress errors concerning the collection of

taxes. Thus, it appears that Congress intended that the refund statutes and the Anti-Injunction Act would provide a "complete system of corrective justice in regard to all taxes imposed by the General Government. . . ." *State Railroad Tax Cases, supra* at 613.

Recent expressions of the purposes of the Anti-Injunction Act accept the same rationale. The brief for the Government in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) (p. 13) described the twofold purpose of section 7421 in this way:

> —institution of a uniform system for a judicial determination of the correctness of a tax assessment and protection of the government's paramount need of being able to collect its revenues without dependence upon a prior judicial adjudication—

This Court appears to have concurred with that statement in its decision in *Enochs*, where Chief Justice Warren stated that the "manifest purpose" of section 7421 is to "permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner, the United States is assured of prompt collection of its lawful revenue." 370 U.S. at 7. See also *Thrower v. Miller*, 440 F.2d 1186, 1187 (9th Cir. 1971).

It should be apparent that a statute enacted in 1867, when there were no exempt charitable organizations, no rulings by the Revenue Service, and no need to insure tax deductions for their donors, cannot have been originally intended to apply to the situation presented here. None of the amendments to the Anti-Injunction Act has in any way touched upon the problem of ruling revocations for charitable organizations. Thus, if the Act is found to apply in this case, it must be because its underlying purposes

would be advanced by applying it in this instance. Yet the "manifest purpose" of assuring the prompt collection of tax revenues has virtually nothing to do with this lawsuit. What is involved here is the right of a charitable organization to continue to receive life-sustaining contributions. Since there will be virtually no effect on the revenue from issuing an injunction in this case, it is apparent that the revenue-gathering purposes of section 7421 will remain intact even if the Act is held to be inapplicable here. Thus, the absence of any rational purpose for invoking section 7421 is reason enough for this Court to sustain the decision below. But as we shall now demonstrate, there are also decisions of this Court which strongly support respondent's position.

III.

DECISIONS OF THIS COURT DIRECTLY SUPPORT THE RULING OF THE COURT OF APPEALS

This Court's most recent decision construing the Anti-Injunction Act, *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), is the cornerstone of the Government's case. In our view it is distinguishable on its facts from the instant action, and moreover did not fully consider precedents of this Court which, while having little bearing there, are of great significance in this case.

Unlike the instant action, the avowed purpose of the plaintiff in *Enochs* was the restraining of the collection and assessment of $41,568.57 in social security and FUTA taxes—the very taxes which respondent here has paid and will continue to pay until a final judgment is entered in its favor. When the action in *Enochs* was filed, taxes for three prior years were then due, but the taxpayer contended that the full payment would cause him to go into bankruptcy.

370 U.S. at 5. In ruling that the Anti-Injunction Act applied unless the plaintiff could establish both the inadequacy of its legal remedy and that under no view of the facts or law could the Government possibly prevail, this Court stated that harm to plaintiff from the collection of these taxes was not legally sufficient. Clearly, *Enochs* is an example of the classic case for which section 7421 was intended: a taxpayer with a genuine dispute with the collector about a tax liability and with a claim, often difficult to verify, that financial ruin would result from payment. It was to prevent this very kind of suit and to assure the prompt collection of revenue that section 7421 was originally enacted and its applicability to *Enochs* could hardly have been disputed.[9]

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[9]We respectfully suggest that the Chief Justice's reliance on the differences in language between section 7421 and 28 U.S.C. §1341, a point not briefed by either party, as a basis for the decision in *Enochs* is misplaced. The latter provision, which prohibits injunctions against the assessment or collection of any state tax, contains an explicit exception for situations in which there is no "plain, speedy and efficient remedy" in the courts of the state. From this explicit exception the Court concluded that Congress knew how to make adequacy of remedy the controlling test, and that the absence of such a provision in section 7421 indicated an intention on the part of Congress that adequacy of remedy was not to be the controlling factor under that statute. 370 U.S. at 7-8.

The legislative history of section 1341 contains little support for that analyses. The bill's sponsor, Senator Bone, noted that the bill was "not novel in character" and cited the predecessor of section 7421 as well as a similar statute prohibiting injunctive actions with respect to Puerto Rican taxes. He also pointed to the Johnson Act of 1934, 45 Stat 775, now codified as 28 U.S.C. §1342, which contains prohibitions against injunctions of administrative decisions of state utility commission where is a "plain, speedy, and efficient" state court remedy. Throughout his discussion he treated both the absolute

(Footnote continued on next page)

Although invoking the Anti-Injunction Act in *Enochs*, this Court recognized that the statutory prohibition, which is absolute on its face, had never been construed to exclude all exceptions. The discussion of the exceptions, however, was confined to the decision in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), which *Enochs* construed as requiring that, in addition to general equity jurisdiction and an illegal tax, the illegality must be an exaction in "the guise of a tax", 370 U.S. at 7, which the *Enochs* court interpreted to mean a tax that could under no circumstances be properly collected. While that construction of section 7421 covers cases similar to the *Nut Margarine* decision, it overlooks significant other decisions by this Court which in differing circumstances have found the Anti-Injunction Act to be inapplicable. In general, those other exceptions have been created where the tax was either not imposed against the party bringing suit, or was intended to provide coercion to comply with a regulatory scheme rather than to raise revenue.

For example, in *Hill v. Wallace*, 259 U.S. 44 (1922), a

(Footnote 9 continued from page 18)

statutes, such as 7421, and the Johnson Act identically. See 81 Cong. Rec. 1415-1417 (1937).

Moreover, the Senate report accompanying the bill suggests no distinction of the kind drawn by the Chief Justice. "This legislation does not introduce a new principle, since the Congress has passed statutes of similar import." S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937). The House Report incorporated the Senate report and added a legal brief which quoted from a recent decision of this Court, *Matthews v. Rogers*, 284 U.S. 521, 526 (1932), which held that injunctions against state taxes could be issued only where there was no "plain, adequate and complete" remedy in the state courts. H. Rep. No. 1503, 75th Cong. 1st Sess. 4(1937). Thus, it is difficult to understand the basis upon which it was concluded in *Enochs* that sections 7421 and 1341 contained different standards.

suit was brought against the Secretary of Agriculture and various officials of the Internal Revenue Service to prevent the collection of a tax on grain futures, the imposition of which would, as a practical matter, have required the Chicago Board of Trade either to cease operating or to comply with certain regulatory provisions allowing for an exemption from the tax. This Court, in sustaining the action and issuing an injunction against the local collector of revenue, noted that there were "extraordinary and entirely exceptional circumstances" making the Anti-Injunction Act inapplicable. 259 U.S. at 62. Viewed objectively, both *Hill* and this action primarily seek to challenge regulatory statutes and were not brought to prevent the imposition of taxes needed to finance the Government. That this Court in *Enochs* relegated *Hill* to a footnote and that *Hill* was not mentioned in either side's brief, support our position that *Enochs* did not supplant *Hill* because the latter case was not considered by this Court or the parties to be relevant. Since in both *Hill* and this case there exist "exceptional and extraordinary circumstances", and since in both cases the purpose of safeguarding the revenue would not be thwarted by holding the Anti-Injunction Act to be inapplicable, section 7421 should be no more of a bar here than it was in *Hill.*

In a similar case, *Lipke v. Lederer,* 259 U.S. 557 (1922), this Court again refused to apply the Anti-Injunction Act to restrain the collection of a "tax" on liquor which the Court found to be in reality a penalty for violation of the crime of possessing liquor. As the Court noted, the tax lacked "all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty." 259 U.S. at 562 (citations omitted.). Similarly

here, the primary effect of the revocation of the ruling was not to impose FUTA taxes on Americans United but to penalize it by rescinding its license to raise tax-deductible funds. We do not contend that the difference between the primary and secondary effects of a particular action by a governmental official can always be discerned or always provide a touchstone. However, since the main thrust of the revocation here is undeniably the imposition of a significant burden on respondent's fund raising capabilities, this fact should be considered in determining whether the prohibitions of section 7421 were intended to apply to this situation, or whether, as this Court found in *Lipke*, section 7421 has no relevance in cases of this kind.

The decision of this Court which most nearly approximates the instant case is *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938). Like *Hill*, it was relegated to a footnote in *Enochs*, undoubtedly because the cases were seen by the Court to be distinguishable.[10] The plaintiff in *Allen* was the University System of Georgia, which claimed that a federal tax on admissions, as applied to state-sponsored collegiate athletic contests, was unconstitutional. The tax was imposed on the spectators, but the University was required to collect it and pay it over to the Government. In addition, all tickets were required to show the percentage of the total ticket price which the tax comprised. A failure to comply with these provisions resulted in a penalty only in cases of willfulness.

The university was found to have standing to raise the constitutionality of the tax because of the significant burden and expense imposed on it in collecting the tax and

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[10] The taxpayer's brief in *Enochs* did not rely upon *Allen*, but merely sought to demonstrate that it did not support the Government's position. (Res. Br. p. 22)

filing the required returns, 304 U.S. at 448. However, since the tax was not payable by the University, its original attempt to litigate the question by a claim for refund of the taxes which it collected and paid over was dismissed by the Commissioner on the grounds that the money sought to be refunded was not the University's. 304 U.S. at 446. This Court stated that the plaintiff had a good faith belief that the statute was unconstitutional and that it was "entitled to have a determination" on that question. 304 U.S. at 448. The Government claimed that the Anti-Injunction Act applied, but this Court ruled that the statute is "inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law." 304 U.S. at 449. In holding that section 7421 was not a bar, this Court noted that "respondent was unable by any other proceeding *adequately* to raise the issue of the unconstitutionality of the government's effort to enforce payment." *Id.* (emphasis added).

Having found the Anti-Injunction Act to be inapplicable, the Court decided the merits and upheld the statute's constitutionality. This fact is of vital significance in determining the relation between *Allen* and *Enochs* since the latter stated that an injunction would lie *only* if "it is clear that under no circumstances could the government ultimately prevail. . . ." 370 U.S. at 7. However, in *Allen* it was certainly not "clear" that the Government would not prevail, and in fact the Court held in the same decision that the Government was correct on the merits. Thus, it is obvious that either the exception in *Enochs* is not exclusive, or that *Enochs* overruled *Allen sub silentio.* In our view the evidence points strongly toward non-exclusivity since *Allen* is distinguishable from *Enochs.* In *Allen* the plaintiff was not objecting to a tax imposed on it, as it was in *Enochs,* but was seeking to obtain an adjudication which, while having the effect of reducing the taxes of others, was

primarily directed at relieving a non-tax burden on itself. Thus, there is no reason to believe that *Allen* is not still the law in the circumstances presented there.

Since Americans United does not seek to restrain the assessment or collection of any tax imposed upon it but seeks merely to relieve itself of a different burden—the burden of not being able to raise funds—*Allen* is in point and section 7421 is inapplicable. As in *Allen* there is "no plain, adequate and complete remedy at law", and hence Americans United should be permitted to bring this action without regard to section 7421.[11]

In this connection it should be noted that, even in the face of congressional enactments of specific statutory exemptions to section 7421, this Court has never considered its literal prohibitions to be absolute. Thus, section 7421(a) now includes a specific grant of the right to injunctive relief in accordance with the provisions of the sections noted therein. One of those sections, section 6213(a), provides for injunctive relief when a taxpayer has a pending petition before the tax court on income, gift or estate tax liabilities, notwithstanding section 7421. The income and estate tax exclusions date back to the Revenue Act of 1926, sections 274(a) and 308(a), 44 Stat 55 and 44 Stat 75, respectively. Yet this Court in both *Nut Margarine* and *Allen*, which were decided subsequent to their enactment, upheld the existence of implied exceptions to the absolute prohibition of the predecessor of section 7421(a) in spite of the Congressional inclusion of specific exceptions.

Case law has also produced other exceptions to the Anti-Injunction Act, such as for disputes involving the title to

[11]The examples cited by petitioner (Br. 27, note 17) of other instances which would fall within this rule are all distinguishable since they do not involve a ruling essential to the very existence of an organization which is engaged in First Amendment activities.

property which the Government has claimed under a tax lien. In *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942), for example, the Court denied the Government's claim that the Anti-Injunction Act prevented suits by a trustee to protect his mortgage interest in property claimed by the Service. See also *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962), and *Bartell v. Riddell*, 202 F.Supp. 70 (S.D. Calif. 1962). The right to bring these actions is now set forth in section 7426, which was enacted in 1966 at the same time section 7421(a) was amended to make specific reference to this exception.[12]

The legislative history of section 7421(b) also indicates that the courts and the Congress have not given section 7421(a) an all-inclusive construction. Section 604 of the Revenue Act of 1928, 45 Stat. 873, added the provision now appearing as section 7421(b), which denies courts the right to enjoin the collection of a transferee's liability for taxes of his transferor. It was necessitated by the decision in *Owensboro Ditcher & Grader Co. v. Lucas*, 18 F.2d 798 (W.D. Ky), *appeal dismissed on government's motion*, 22 F.2d 1015 (6th Cir. 1927), which held that the Anti-Injunction Act did not apply to a suit to enjoin the issuance of a restraint warrant against the transferee, but only applied to taxpayers themselves. See H. Rep. No. 2, 70th Cong., 1st Sess. 32 (1927) and S. Rep. No. 960, 70th Cong., 1st Sess. 39 (1928).

In addition, decisions such as that in *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972), (three-judge court) and *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), *on final injunction sub nom., Green v. Connally*, 330 F.Supp. 1150, (three-judge court), *aff'd per curiam sub nom., Coit v Green*, 404 U.S. 997 (1971), give further in-

[12]Federal Tax Lien Act of 1966, section 110, 80 Stat. 1142.

dication that there are exceptions to the Anti-Injunction Act which are not described in *Enochs*. As this Court stated in *Standard Nut Margarine*, the terms of section 7421 do not rule out all exceptions in so many words, and the "general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutory and well-established rule [that exceptions to the statute exist]" 284 U.S. at 509.

Finally, even when read literally, section 7421(a) does not apply in this case. The statute applies only to suits "for the *purpose* of restraining the assessment or collection of any taxes" (emphasis added), and it is clear that the "purpose" of this law suit, as in *Hill*, is not to restrain the assessment or collection of any tax but to challenge the constitutionality of an essentially regulatory Act of Congress and the revocation of an IRS ruling based on that Act. Neither the Courts nor the Congress has ever considered section 7421 to apply to all controversies involving taxes, and we suggest that it does not even literally apply to this case. In particular, we note the contrast between the language of section 7421(a), with its specific mention of purpose, and that employed in the jurisdictional statute, 28 U.S.C. §1340, which refers to cases "arising under any Act of Congress providing for internal revenue." The breadth of that latter section, when compared with section 7421(a), is further indication that the Anti-Injunction Act is not intended to be all-inclusive. See *Bullock v. Latham*, 306 F.2d 45, 47 (2d Cir. 1962).

In short, there is nothing to suggest that the exception set forth in *Enochs* describes the only situation in which injunctive relief may be available, and there are significant opinions of this Court holding to the contrary. As demonstrated in Point I above, the importance to respondent of

obtaining a favorable IRS ruling cannot be overemphasized, and as we shall now show, the alternative remedies suggested by the Government are wholly inadequate to achieve that result.

IV.

THE REMEDIES SUGGESTED BY PETITIONER ARE COMPLETELY INADEQUATE AND THE UNAVAILABILITY OF ANY LEGAL REMEDY COMPELS THE CONCLUSION THAT THE ANTI-INJUNCTION ACT DOES NOT APPLY IN THIS CASE.

Under petitioner's interpretation of *Enochs*, a plaintiff must show both the inadequacy of his legal remedies and the certainty of success on the merits in order to avoid section 7421. Furthermore, petitioner contends that respondent has an adequate remedy at law either through a refund suit brought by a friendly donor with respect to a deduction denied for a contribution to respondent or one by respondent itself to recover FUTA taxes paid. But, according to petitioner, these remedies will always be available to an organization which has lost its 501(c)(3) status, and thus it necessarily follows that, in petitioner's view, there will never be a case in which a charity can ever meet the tests of *Enochs*. Even were the Commissioner to rule that a particular race or religion was inherently "noncharitable" and hence outside the ambit of sections 170(c)(2) and 501(c)(3), the Government's position would preclude an organization affected by that ruling from obtaining injunctive relief. Quite apart from the advisability or constitutionality of that absolutist position, it is apparent that neither the donor remedy nor the FUTA tax remedy is in any sense adequate. For the following reasons, this Court

should reject petitioner's suggestion that Americans United has an "adequate remedy" in a suit that is brought by another person (a donor) or that raises issues dealing with another tax (FUTA) under another portion of the Code (sections 3301 et seq).

A. The Donor Remedy Is Wholly Unsatisfactory.

In both the District Court and the Court of Appeals, the Commissioner placed major reliance for a satisfactory remedy to challenge the ruling revocation on a suit by a donor who made a contribution to Americans United and whose refund claim based on this contribution was not allowed. According to the Government, the donor would then simply challenge the denial of a small contribution, and the issue could be fully litigated. In theory, this is a nice solution; as a practical matter, it is both unfair to respondent and unrealistic.

First, and most important, the donor remedy does not permit Americans United itself to go to court, and thus it must rely on the willingness of someone else to make a contribution and then to litigate the issues for it. Many individuals may be willing to contribute money but not to sue on behalf of a charitable organization. The problem of finding a friendly donor is greatly increased by the fact that a refund can be granted only if the taxpayer establishes both that the charitable deduction should have been allowed and that his return is in other respects correct. Thus, the Commissioner is entitled to conduct a full audit of the donor's return to determine whether there are any additions to income or any deductions which should not have been taken. The right of the Commissioner to open up the entire year for a full audit will persuade most donors not to volunteer to litigate the test case. Moreover, if any offsets in the form of added income or denied deductions are discovered, and

they exceed the amount of the charitable contribution and are upheld by the Court, the donor will not be entitled to a refund even if he prevails on the "test" issue. In such a situation the Commissioner would contend that the charitable deduction issue is "moot", and there would be no adjudication of the "test" issue.[13]

On the generous assumption that a willing donor could be found, there are other pitfalls that may prevent the legal issue of the deductibility of the gift from being litigated. As Commissioner Thrower pointed out,[14] the best path to follow is for the donor to pay the full amount of the tax and simultaneously submit a claim for refund of the tax; after that claim is denied, a suit for refund can be filed in the District Court or Court of Claims. However, there is no certainty that where the sum of money involved is small, the Service will not simply make a refund, either as a final or tentative matter. In fact, a full refund of the tax on a donor's contribution was made in *Mitchell v. Riddell*, 402 F.2d 842, 844 (9th Cir. 1968), *cert. denied*, 394 U.S. 456 (1969), and as a result the "donor remedy" was eliminated. Whether the refund is made intentionally or inadvertently, a real possibility of mooting the case exists when the contributions are small. Of course, as the size of the contribution increases, the likelihood of a refund would decrease, but then so would the likelihood that an individual would be willing to make the contribution on the chance that it may eventually prove deductible.

Assuming a taxpayer can be found who is willing to make the contribution and to take the Service to court, and

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[13] There may also be questions of standing raised as to the right of the donor to assert all of the constitutional rights and interests of the charity.

[14] See p. 10, *supra*.

assuming that the Service does not simply refund the amount claimed during the court proceeding and thereby moot the controversy, and assuming that there are no offsets that preclude litigation of the issue, there is still an enormous delay involved. An audit on the donor's return, including extensive discovery and examination of his books and records, as well as the litigation of the principal issue, will undoubtedly consume a significant amount of time at the District Court level. Presumably, the Government will take the position that section 7421 would apply even after a victory for the donor in the District Court, so that no injunction could be issued throughout these proceedings. And if any portion of section 501(c)(3) were declared unconstitutional, it seems probable that the Government would attempt to take the case all the way through this Court, thus insuring considerable further delay. Meanwhile, the party with the real interest, Americans United, would be sitting on the sidelines waiting for its ruling and its contributions to return.

It should be apparent that, if the donor remedy were the only remedy, section 7421 would not apply. As this Court said in the *State Railroad Tax Cases* in discussing the operation of R.S. §3224 and the companion refund provisions, they provide a "complete system of corrective justice," 92 U.S. at 613. That statement would clearly be inapplicable if organizations such as Americans United had to rely on the willingness and success of donors in litigating a ruling revocation by the Service.

B. The FUTA Tax Refund Suit Is Not An Adequate Remedy.

The only taxes that respondent has been required to pay as a result of the revocation of its ruling are FUTA taxes which are payable because the exemption in section

3306(c)(8) which previously applied, covers only organizations qualified under section 501(c)(3). The Government claims that a suit for refund of those FUTA taxes would place in issue the very question which respondent seeks to litigate and thus provides an adequate remedy at law. Respondent does not agree, but before turning to the specific reasons why this remedy is not adequate, the Government's position should be placed in perspective. Respondent is seeking to adjudicate the constitutionality of a statute under which its ruling was revoked by the Internal Revenue Service. The Service claims that a statute written in 1867, as a means of assuring the collection of the revenue, is intended to operate to preclude the bringing of an injunctive action for the relief sought and to relegate respondent to a suit for a refund of FUTA taxes, which is available to it because the exemption in section 3306(c)(8) applies only to 501(c)(3) organizations. Seen in this light, it is easy to appreciate the view of the Court of Appeals that the FUTA tax refund remedy is "so far removed from the mainstream of the action and relief sought as to hardly be considered adequate." (A 36, note 13).

Although Americans United paid FUTA taxes, it is by no means certain that it owed any such taxes even without the exemption of section 3306(c)(8), and it is virtually certain that many other similar organizations do not owe such taxes. The FUTA tax imposed by section 3301 is limited by the definitions of "employer", "wages", and "employment" contained in section 3306. For example, under section 3306(a), an "employer" excludes a person who has paid less than $1,500 in wages in any calendar quarter, unless that person employed someone for 20 days, each being in a different calendar week during the calendar year,

or the preceding calendar year.[15] The definitions of "wages" and "employment" in sections 3306(b) and 3306(c) also limit further the number of organizations that will be an "employer" because that term is dependent upon the definitions of "wages" and "employment." While no specific definitional exclusion appears to apply to respondent, the existence of these complicated provisions indicates that many charitable organizations will have extreme difficulty in meeting all of the FUTA tests so that a challenge can be made to a ruling revocation.

Assuming an organization wishes to challenge its ruling revocation by a suit for refund of FUTA taxes, enormous problems must still be overcome. Section 7422(a) requires the filing of a claim for refund before a refund action can be brought. Because the FUTA tax is imposed on an annual bases, no refund can be claimed until after the year in which the taxes are paid. Even then section 6532(a) precludes bringing an action until the claim is denied or has gone unanswered for six months. Only then can a suit be filed, after which the Government has another 60 days to answer the complaint. Since most organizations which have had their rulings revoked will have very little money for salaries, the amounts involved are likely to be very small, especially in view of the credit for state employment taxes provided in section 3302, which can go as high as 90% of the federal tax. Section 3302(c)(1). With such small sums involved, the possibility of inadvertent or intentional refunds without adjudication is very real. Moreover, one organization which attempted to litigate its continuing controversy with the Service on its 501(c)(3) status via a refund suit for $749.04 has met with a tender by the Commissioner of the full $749.04, plus interest, and a claim that the case

[15] Prior to the 1970 amendment there had to be four employees on each of the 20 days before any FUTA taxes were payable, regardless of the total wages paid during the year. See 26 U.S.C. §3306(a) (1964).

must be dismissed as moot. The District Court refused to dismiss on mootness grounds, and the case is now *sub judice* in the Ninth Circuit on an appeal by the Government certified under 28 U.S.C. §1292(b). *Church of Scientology of Hawaii v. United States of America*, No. 71-2761. Thus, the Commissioner asserts plenary power to prevent a charity from litigating a legal issue vital to its existence and in that way destroy the remedy which he claims in this Court to be adequate. Contrary to the petitioner's assertion (Br. 35, note 25), this right to make an administrative refund does pose a "real threat" to actions of this kind. While petitioner is correct that "bad faith on the part of Treasury officials . . . should not be presumed" *id.*, the *Church of Scientology* case takes us far beyond any such presumption. See also *Mitchell v. Riddell*, 402 F.2d 842, 844 (9th Cir. 1968), *cert. denied*, 394 U.S. 456 (1969) (donor refund suit mooted) and note 17, *infra*.

If, as seems likely, the Government wishes to avoid litigating the constitutional question, it can take the opportunity of the refund suit to re-examine the activities of the charity to determine whether anything it has done otherwise disqualifies it from section 501(c)(3). This examination would include extensive discovery and may even produce a reason for disqualification that could have been corrected by the charity without loss of its status had it been noted at the administrative level.[16] Thus, there is a real possibility that a particular refund action will be decided without reaching a determination as to the legality of the grounds relied on to revoke the ruling, and the organization would have to return to court to litigate the real issue in another action for other years.

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[16] For a suit in which this kind of detailed factual inquiry and determination was made, see *Krohn v. United States*, 246 F.Supp. 341 (D. Col. 1965).

Even if the charity emerges victorious at the District Court level, the Commissioner would almost certainly argue that section 7421 still precludes the issuance of an injunction because the decision might be reversed on appeal. Therefore, a charity may have hope from a District Court victory, but no contributions. In addition, the Service could decide not to take an appeal for a variety of reasons and still refuse to reinstate the organization's name on its cumulative list.[17] If the Government does appeal, or if the plaintiff loses and appeals, further delay is certain. The progress of the charity which sought to invoke this remedy in *Christian Echos National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *petition for writ of certiorari pending*, No. 72-1378, is illustrative. In *Christian Echos* the ruling was revoked on September 22, 1966, and the case is still not concluded.[18] Thus, regardless of which side emerges victorious in the Court of Appeals, and assuming no remand for further proceedings, the loser is almost certain to attempt to take the case to this Court, thereby creating further delay. During all this time, regard-

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[17] The Government has done virtually that in a Freedom of Information Act situation in which the plaintiff sought Medicaid reports for 13 nursing homes. After the issue was litigated in the District Court with a victory for the plaintiff, the Government determined not to appeal. *Schechter v. Richardson*, (D.D.C., Civ. Action No. 710-72). Thereafter, when the same plaintiff sought additional reports for other nursing homes for other periods, the Social Security Administration refused to turn them over and another litigation was started. This time the case was assigned to a different judge who reached a different conclusion, and now the same plaintiff is in the Court of Appeals almost a year after his first victory in the District Court. See *Schechter v. Weinberger*, No. 73-1797, (D.C. Cir.).

[18] Although procedural complications may have caused some of the delay in *Christian Echos*, those are the sort of problems which must be expected in complex litigation of this kind.

less of whether the charity has been successful in both the District Court and Court of Appeals, presumably the Government would continue to contend that section 7421 applies because of the possibility of ultimate victory for the Service in the Supreme Court. There are few organizations indeed that will be able to withstand this multi-year drought in contributions while awaiting the outcome of a refund suit.

But even a victory in the Supreme Court in the FUTA suit may not be sufficient to insure reinstatement of the prior ruling. Although the Solicitor General suggests that victory in a refund suit is enough, that is not the official position of the Service. Paragraph 270 of the IRS's own Exempt Organization Handbook states its position as follows:

> An organization which obtains a tax court or district court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption, for years subsequent to those involved in the court decision.

Since refund suits will always be for prior years, and since contributions will always be sought for subsequent years, it appears to be the Service's position that Americans United will be back where it started even after it wins its hypothetical refund suit in this Court.[19] Thus, it appears that, not only is the FUTA tax refund suit inadequate, it is no remedy at all for the only relief sought by respondent—restoration of its right to receive tax-deductible contributions because the Service will not honor the judgment for future years.

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[19] Petitioner also took this position in *Church of Scientology of Hawaii v. United States of America*, No. 71-2761, brief of appellant, pp. 5, 9-10.

Moreover, the refund suit may be inadequate for other reasons. An adjudication relates only to the qualification of the organization under section 501(c)(3) and the real benefit sought is qualification under section 170(c)(2). This distinction may be crucial since the statutory standards, though quite similar, are not identical. For instance, an organization can meet the test of section 501(c)(3) if it is engaged in "testing for public safety", and yet there is no comparable inclusion in section 170(c)(2). Similarly, a foreign organization can meet the tests of section 501(c)(3), but not those of section 170(c)(2). Furthermore, section 170(c)(2) contains a final proviso that a corporate gift is deductible only if it is to be used within the United States or any of its possessions, a finding which is not required for qualification of an organization under section 501(c)(3). Thus, it is possible that even a Supreme Court decision would not preclude the Service, from asserting that certain of the matters which might prevent qualification under section 170(c)(2) have not been fully adjudicated. In such cases there would be *no* remedy available to litigate the issues, other than a suit by a donor.

In fact, there are four separate kinds of organizations which are eligible to receive tax deductible contributions under section 170(c) and which have *no* FUTA tax refund remedy under current law. The first of these is the charitable trust, which is included under section 170(c)(2) but which may not pay any income taxes as a result of the operation of section 642(c) and not be exempt under section 501(c)(3). Since the exclusion for FUTA taxes in section 3306(c)(8) applies only to 501(c)(3) organizations, the FUTA tax remedy is not available for charitable trusts although it is for charitable corporations. The distinction between a charity operating in trust form, and one operating in a corporate form, is doubtless meaningful in some situations

and may be dictated by state law, but it hardly makes sense to draw a distinction for purposes of section 7421 based upon that difference.

Under section 170(c)(3) contributions to certain veterans organizations are tax deductible, but those organizations do not qualify under section 501(c)(3) and hence would have no FUTA tax remedy available should they lose their status under section 170(c)(3).[20] Another similar case involves domestic fraternal societies to which contributions are deductible under section 170(c)(4), and which are exempt from income taxation under section 501(c)(10). Finally, cemetery companies described in section 170(c)(5) are also eligible to receive tax deductible contributions, and their income tax exemption is based on section 501(c)(13).

In each of these cases the allegedly adequate remedy of a FUTA tax refund suit is not available.[21] If petitioner's position is correct, these organizations would have no remedy for themselves and could only hope that a friendly donor might save them. We submit that extending section 7421 to those situations would present the most grave constitutional questions[22], and thus it seems highly unlikely

[20] Certain veterans groups are exempt from income taxes under section 501(c)(19), enacted in 1972. Others may qualify as social welfare organizations under section 501(c)(4) or as social clubs under section 501(c)(7).

[21] No refund suit for social security taxes would be available either since the exemption in section 3121(b)(8)(B), like that for FUTA taxes in section 3306(c)(8), applies only to 501(c)(3) organizations.

[22] As the Court pointed out in *Botta v. Scanlon*, 288 F.2d 504, 506 (2d. Cir. 196), the Fifth Amendment's proscription against taking property without due process of law might well operate to preclude the application of section 7421 in such circumstances. See also the dissenting opinion in *Bob Jones University v. Connally*, 472 F.2d 903, 909 (4th Cir. 1973), *rehearing denied*, 476 F.2d 259, *petition for writ of certiorari pending*, No. 72-1470.

that it would be held to cover those cases. If other types of organizations which have no FUTA tax remedy would not be barred by section 7421, it makes no sense to distinguish for these purposes between those that theoretically have the FUTA tax remedy available and those that do not. There is nothing to suggest that the Congress which enacted the predecessor of section 7421 in 1867, or any subsequent Congress, had any reason to distinguish between these two groups of organizations for purposes of section 7421. Therefore, rather than requiring the courts to make a detailed examination in every case to determine whether there is a FUTA tax remedy available, a determination which may only be possible after trials and appeals, it is far more sensible to exempt from the operation of section 7421 all those cases in which the only available remedy is the possibility of a FUTA or a donor's refund suit.

But even if Americans United were successfully to prosecute its refund suit and to secure a refund of every penny of FUTA taxes that it paid, plus interest, that remedy is in no way adequate. Indeed a refund of those taxes is basically irrelevant to Americans United's problem. What cannot be refunded are the lost contributions beginning in April 1969 and continuing to the final date that the Supreme Court upholds the taxpayers' position.[23] There is no refund suit available for lost contributions, either against the United States or against the unknown contributors who have decided to keep their money or to put it to other charitable uses. On the other hand, the right to challenge the ruling revocation by an immediate injunctive action at least holds open the possibility that interim relief will

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[23] That, of course, assumes that the Service does not claim that new facts have come to light for years not at issue in the refund suit that now make it impossible to allow a deduction under section 170(c)(2) even though the refund suit was successful. See p. 34, *supra*.

assure that contributions will continue until the dispute is resolved. Where an injunction is sought merely against the collection of taxes, the ultimate recovery of those taxes makes a refund suit adequate, see *Snyder v. Marks*, 109 U.S. 189, 193 (1883), and yet it is apparent that a recovery of the FUTA taxes paid will be of virtually no significance to Americans United and will not be able to compensate it for the loss of donations.

In other situations in which 7421 is a bar, the plaintiff has available a remedy that is fully adequate. Thus, since income taxes can be contested without payment by petitioning the Tax Court, see section 6213(a), they present no problem even where assessments are extremely large. Liability for FUTA and social security taxes, where those are the real issues in the case, can be contested by payment for a single employee and, for social security taxes, for a single quarter. See *Steele v. United States*, 280 F.2d 89 (8th Cir. 1960). Therefore, the taxpayer's predictions of bankruptcy in *Enochs*, 370 U.S. at 5, were premised on an erroneous understanding of the tax laws since according to the Government's brief in this Court (p. 9), a payment of only $2,000 would have permitted the taxpayer to litigate the entire controversy. Even gambling and other excise taxes, where full payment may be prohibitive, can be contested on a single transaction basis. *Vuin v. Burton*, 327 F.2d 967 (6th Cir. 1964). Therefore, a taxpayer who is even moderately careful can insure that no matter how large the assessment, there is a procedural device by which it can be contested without first paying the full amount claimed.[24]

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[24] The validity of the remainder of the tax would be raised by way of a counterclaim by the Government. In order to protect its claim, the Government may require the taxpayer to agree to extend the statutes of limitation on assessment and collection, but it will not normally commence collection activities unless there is a real likelihood that the taxpayer will dissipate his assets in the interim.

That is simply not the case in this situation. The remedy of a FUTA tax refund suit is really beside the point because it cannot recover what is really at issue—the loss of contributions both past and future. As Judge Tamm found, there is no "meaningful alternate form of relief" (A 38), or in the language of this Court in the *State Railroad Tax Cases*, 92 U.S. at 613, the "complete system of corrective justice" does not exist. For this reason alone, this case is distinguishable from every other action in which it has been held that section 7421 applies and, accordingly, this Court should hold that section 7421 does not preclude injunctive relief here.

Since the Service implicitly concedes that respondent must be afforded a means to litigate its contentions, there is no reason to require the circular and inadequate route of a FUTA tax refund suit, rather than permitting a direct and certain challenge in the District Court. Furthermore if a refund suit is required the Government will lose the advantage of a three-judge court which, as the Court below recognized, is intended to guard against "impolitic action on the part of lone federal district judges in matters of broad regulatory scope. . ." (A 28).

In sum, we submit that section 7421 was never intended and should not be held to apply to attempts by charitable organizations to challenge adverse rulings by the Internal Revenue Service. There were no such organizations in 1867, and there is not the slightest indication of any congressional consideration of section 7421 in the light of this situation. There is every reason to except this type of action from section 7421, and no reason to include it. The claim of "protection of the revenue" is simply inapplicable and is wholly inappropriate in the absence of any system of "corrective justice" which is so badly needed in these types of cases. There is no other plain, speedy,

adequate, and complete remedy at law available for Americans United and other similarly situated organizations. For this reason, as well as for the others set forth above, this Court should hold that section 7421 is inapplicable in this case.

V. The Doctrine Of Sovereign Immunity Is Inapplicable In This Case.

In a further effort to prevent respondent from meaningfully challenging the ruling revocation, petitioner raises the specter of sovereign immunity as a bar to the maintenance of this action. Petitioner's brief advances the doctrine of sovereign immunity without so much as even a mention of the three statutes which provide subject matter jurisdiction in this case—section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, 28 U.S.C. §1331 (the general federal question jurisdictional statute), and 28 U.S.C. §1340 (the jurisdictional statute for controversies arising under the Internal Revenue laws).

Nor does petitioner dispute the inapplicability of sovereign immunity when it is alleged that a Government officer has exceeded the scope of his authority or is acting pursuant to an unconsitutional statute. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949), and *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963). However, seizing on a footnote in *Larson*—and elevating it to the status of a holding—petitioner contends that sovereign immunity applies in this case because the complaint seeks affirmative relief (Br. 46).[25] In doing so, petitioner focuses solely on one aspect of the relief sought,

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[25] One court has recently referred to the passage relied on by petitioner as "controversial dictum." *State Highway Comm. v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973).

i.e., the reinstatement of the prior ruling. He neglects to point out that paragraphs 1,3 and 5 of the prayer for relief do not require any such affirmative action and that paragraph 4 asks only for a reopening in the light of the final decision in this case (A 16), hardly the kind of affirmative action which sovereign immunity was intended to preclude. Moreover, we respectfully submit that in the event of a refusal of the Commissioner to reinstate respondent's ruling after an ultimate victory on the merits in this case, it is clear that mandamus relief under 28 U.S.C. §1361 would be appropriate. Although the Commissioner is not required to issue rulings at all, having done so for other taxpayers he cannot arbitrarily refuse to do so for Americans United.

Other aspects of petitioner's assertion of sovereign immunity in this case are inconsistent with other positions he has taken. Petitioner has steadfastly insisted that respondent can obtain all of the relief that it desires if only it would commence a refund action for the FUTA taxes. If victorious in that action, the Commissioner suggests, respondent's favorable status would be regained and presumably the affirmative relief of reinstatement on the Commissioner's cumulative list would also be available.[26] Yet in this proceeding, petitioner continues to maintain that, although an adequate remedy is available by the refund suit method, the same relief is barred here by the doctrine of sovereign immunity.

Furthermore, petitioner has asserted in response to the petition for certiorari in *Bob Jones University v. Connally*, No. 72-1470, that the decision there is in "direct conflict" with this case. Memorandum for Respondent, p. 4. Yet neither in the Court of Appeals nor in this Court, has the

[26] But see page 34 *supra*.

Commissioner asserted that sovereign immunity is a bar to judicial review in *Bob Jones.*[27] The only distinction between *Bob Jones* and this situation is that the Service revoked the ruling of Americans United before it could go to court, whereas *Bob Jones* was able to file suit prior to the issuance of the ruling revocation. Surely, the applicability of the doctrine of sovereign immunity cannot depend upon these factual distinctions; such a rule would only create a race between an aggrieved charity and the Service in order to decide the question of sovereign immunity.

Finally, nothing in *Louisiana v. McAdoo,* 234 U.S. 627 (1914), supports petitioner. Although that decision contains language indicative of a concern with sovereign immunity, it is, we submit, a decision relating primarily to standing since the plaintiff there was complaining about the inadequate tariffs which the Secretary of Treasury had imposed on Cuban sugar in competition with sugar which the plaintiff manufactured. Moreover, even as a competitor standing case, its validity is in serious doubt since this Court's decisions in such cases as *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970).

Neither precedent nor reason support the assertion of sovereign immunity in this case, and petitioner's contention to the contrary should be dismissed.

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[27] In his petition in the instant case, the Commissioner took the position that the decision below was in conflict with *Bob Jones* and that any differences were "immaterial." Petition for Writ of Certiorari, pp. 9-10 and note 3.

VI.

THE COMPLAINT RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS REQUIRING THE CONVENING OF A THREE-JUDGE COURT.

Petitioner further contends that there is no constitutional question raised in this action which requires the convening of a three-judge court.[28] A discussion of that issue must begin with the proper standard for convening a three-judge court, *i.e.*, whether the complaint raises a "substantial" constitutional question. See *Idlewood Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962). A case raises a "substantial" constitutional question unless the issue is foreclosed by prior decisions of this Court or is obviously without merit. *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938). Just last term, this Court restated the rule for determining substantiality, holding that a claim is "constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous. . . ." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). It is clear that under *Goosby* the substantiality test is easily met by respondent.[29]

The sole decisions of this Court relied upon by petitioner are *Cammarano v. United States*, 358 U.S. 498

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[28] This issue was not presented in the petition and in our view is not "fairly comprised" within the question presented as required by Rule 23, 1(c) of this Court. See Response to Petition for Writ of Certiorari, p. 7, note 2.

[29] For a detailed discussion of the constitutional issues presented, see T. A. Troyer, *Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Tax Institute 1415 (1973).

(1959) and *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973). In *Cammarano* this Court upheld IRS regulations which denied deductions for businesses for those expenses incurred in attempting to influence legislation. The claim of unconstitutional abridgment of a First Amendment right to petition the Government was rejected by the Court primarily on its finding that Congress decided that "everyone in the community should stand on the same footing as regards [the deductibility of lobbying expenses] as far as the Treasury of the United States is concerned" 358 U.S. at 513. See also *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930). Since respondent's basic point is that the "same footing" premise upon which *Cammarano* was founded does not exist in this case, it is apparent that *Cammarano* does not "inescapably render [these] claims frivolous."

Similarly, the decision of this Court in the *San Antonio School District* case is by no means dispositive of the claims here. In *San Antonio* this Court held that alleged discriminations in education based upon disparities in the amount of state financial aid available did not constitute an improper discrimination under the Fourteenth Amendment. In reaching that result, this Court specifically refused to classify the right to education at issue as a "fundamental right" which would have required a strict standard of review, *id.* at 37, noting that it was not one of the enumerated rights in the Bill of Rights. *Id* at 35. By way of contrast, the rights asserted here—freedom of speech and association and the right to petition the Government—are specifically included in the First Amendment, and hence *San Antonio* is distinguishable. Therefore, the discrimination between wealthy and poor organizations alleged here must be tested under the strict standard of judicial review found not to be applicable in *San Antonio*.

There are other constitutional questions presented which are also substantial enough to require the convening of a three-judge court. Respondent's allegation that the anti-lobbying proscriptions violate its First Amendment rights by imposing an unconstitutional penalty for exercising them, see *Speiser v. Randall*, 357 U.S. 513 (1958), is not foreclosed by *Cammarano*. *Cammarano* dealt solely with the denial of deductions for lobbying activities, and not with the entire loss of a favorable tax status for engaging in such activities. Mr. Justice Douglas in his concurring opinion in *Cammarano* specifically noted this distinction when he indicated that, if Congress had denied all deductions (and not merely those for lobbying) on the ground that the taxpayer had engaged in lobbying activities, then it would place a penalty on the exercise of First Amendment rights which could not withstand a constitutional challenge under *Speiser, supra*. See 358 U.S. at 515. Since the penalty which was not present in *Cammarano* is present in this case, *Cammarano* does not control, and a substantial constitutional question is presented.

Respondent's complaint also alleges that the terms "substantiality" and "propaganda" are so lacking in specificity that they fail to pass constitutional muster (A 15). This issue was not before this Court in *Cammarano* and is not disposed of in any decision of this Court, particularly in light of the harsh penalty which is exacted for overstepping the vague statutory boundaries.[30]

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[30]The Service's own Exempt Organization Handbook does little to clarify the matter. See paragraphs 764(1): "There is no simple rule as to what amount of activities is substantial. The one case on this subject is of very limited help." and (2) "The central problem is more often one of characterizing the various activities as attempts to influence legislation." The Handbook is intended to be used by Service employees as a guide in processing ruling applications and in conducting audits.

Moreover, the restrictions on lobbying deny respondent equal protection of the laws under the Fifth Amendment in view of the fact that other similarly situated organizations, such as war veterans groups, domestic fraternal organizations, and certain cemeteries, are entitled to receive tax-deductible contributions under other provisions of section 170(c) and are not limited in any way in their legislative activities, as charitable organizations such as Americans United are. Because of the importance of First Amendment rights, this legislative classification will require the strictest scrutiny in determining whether a rational basis for it exists. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968).

Although in our view the substantiality issue is not before this Court, it is nonetheless apparent that the issues presented by respondent more than meet the requirements for the convening of a three-judge court.

CONCLUSION

The Commissioner has approached this case as though it were purely a tax case and the essential concern was protection of the revenue. Far more than that is involved, however, since what respondent seeks for itself and for other charitable and educational institutions is the right to go to court in a meaningful action when its very existence is at stake. The alternate remedies of refund suits by a friendly donor to challenge a denied deduction, or by respondent to recover FUTA taxes, are wholly inadequate to protect the real right at issue—the right to continue to receive tax-deductable contributions which are a necessity if the organization is to maintain its operations. Respondent has sought to challenge petitioner's revocation of the ruling which it had for almost twenty years and has claimed that its constitutional rights have been denied by the ac-

tions of petitioner. Nothing in section 7421 suggests, let alone compels, that respondent seek redress for the denial of its constitutional rights in a manner other than the one it has chosen in this case. The Court of Appeals correctly held that charitable organizations, engaged in activities protected by the First Amendment's guarantees of freedom of speech and association, may bring direct actions in the district courts when the Commissioner takes action against them which undercuts their very existence by denying them the right to receive tax-deductible contributions. Accordingly, the decision of the Court of Appeals should be affirmed, and a three-judge court convened immediately to consider respondent's challenge on the merits.

Respectfully submitted,

Alan B. Morrison
Room 515, 2000 P Street, N.W.
Washington, D.C. 20036

Franklin C. Salisbury
Room 545, 1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Respondent

September 26, 1973

APPENDIX

Internal Revenue Code of 1954, as amended, 26 U.S.C. Section 170

(c) For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

* * *

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

(3) A post or organization of war veterans, or an auxiliary unit or society of, or trust or foundation for, any such post or organization—

(A) organized in the United States or any of its possessions, and

(B) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(4) In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(5) A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.

* * *

Section 501

(c) The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * *

(7) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.

* * *

(10) Domestic fraternal societies, orders, or associations, operating under the lodge system—

(A) the net earnings of which are devoted exclusively to religious, charitable, scientific, literary, educational, and fraternal purposes, and

(B) which do not provide for the payment of life, sick, accident, or other benefits.

* * *

(13) Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * *

(19) A post or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for,

any such post or organization—

(A) organized in the United States or any of its possessions,

(B) at least 75 percent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans), or are cadets, or are spouses, widows, or widowers of war veterans or such individuals, and

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 3306

(c) For purposes of this chapter, the term "employment" means any service

* * *

except—

* * *

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

* * *

Section 7421

(a) Except as provided in section 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a ficuciary under section 3467 of the Revised Statutes (31 U.S.C. 192) in respect of any such tax.

Declaratory Judgement Act, as amended, 28 U.S.C. §2201,

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Jurisdictional Statutes

28U.S.C. §1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

* * *

28 U.S.C. §1340

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

5 U.S.C. §§701-706, Section 10, Administrative Procedure Act, as amended

§701

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * *

§702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§703

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgements or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

* * *

§705

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.